2010

Utah Chapter of the Sierra v. Utah Division of Oil : Brief of Appellee

Utah Court of Appeals

IN THE UTAH SUPREME COURT

UTAH CHAPTER OF THE SIERRA CLUB, et al., Petitioners and Appellants, vs. UTAH BOARD OF OIL, GAS & MINING and UTAH DIVISION OF OIL, GAS & MINING, Respondents and Appellees, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH, Respondent/Intervenors and Appellees.	Appeal No. 20100969-SC Agency Docket No. 2009-019 Cause No. C/025/0005 **Oral Argument Requested**

BRIEF OF RESPONDENTS-APPELLEES

Appeal from Findings of Fact, Conclusions of Law and Final Order of the Utah Board of Oil, Gas and Mining

Steven F. Alder, No. 0033
Michael S. Johnson, No. 6903
Fredric J. Donaldson, No. 12076
Emily E. Lewis, No. 12281
Assistant Utah Attorneys General
Mark L. Shurtleff, No. 4666
Utah Attorney General
1594 West North Temple, Suite 300
Salt Lake City, UT 84114
Telephone: 801-580-5878
stevealder@utah.gov

Attorneys for Respondents-Appellees Utah Board of Oil, Gas and Mining and Utah Division of Oil, Gas & Mining

Denise A. Dragoo
James P. Allen
SNELL & WILMER, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101
Telephone: 801-257-1000
ddragoo@swlaw.com
jpallen@swlaw.com

Bennett E. Bayer, *pro hac vice*
LANDSRUM & SHOUSE, LLP
106 West Vine Street, Suite 800
Lexington, KY 40507
Telephone: 859-255-2424
bbayer@landsrumshouse.com

Jim R. Scarth
KANE COUNTY ATTORNEY'S OFFICE
76 North Main Street
Kanab, UT 84741
Telephone: 435-644-5278
attorneyasst@kanab.net

Attorneys for Respondents-Intervenors-Appellees

Stephen H.M. Bloch
SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 84111
Telephone: 801-486-3161
steve@suwa.org

Walton Morris, *pro hac vice*
MORRIS LAW OFFICE, P.C.
1901 Pleasant lane
Charlottesville, VA 22901
Telephone: 434-293-6616
wmorris@charlottsville.net

Tiffany Bartz
ATTORNEY AT LAW
213 Erie Street
Cambridge, MA 02139
Telephone: 510-701-1085
tiffbartz@gmail.com

Sharon Buccino, *pro hac vice*
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Avenue, N,W.
Suite 400
Washington, DC 20005
Telephone: 202-289-6868
sbuccino@ndrc.org

Attorneys for Petitioners-Appellants

IN THE UTAH SUPREME COURT

UTAH CHAPTER OF THE SIERRA CLUB, et al., Petitioners and Appellants, vs. UTAH DIVISION OF OIL, GAS & MINING, UTAH BOARD OF OIL, GAS & MINING, Respondents and Appellees, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH, Respondent/Intervenors and Appellees.	Appeal No. 20100969-SC Agency Docket No. 2009-019 Cause No. C/025/0005 **Oral Argument Requested**

BRIEF OF RESPONDENTS-APPELLEES

Appeal from Findings of Fact, Conclusions of Law and Final Order of the Utah Board of Oil, Gas and Mining

Steven F. Alder, No. 0033
Michael S. Johnson, No. 6903
Fredric J. Donaldson, No. 12076
Emily E. Lewis, No. 12281
Assistant Utah Attorneys General
Mark L. Shurtleff, No. 4666
Utah Attorney General
1594 West North Temple, Suite 300
Salt Lake City, UT 84114
Telephone: 801-580-5878
stevealder@utah.gov

Attorneys for Respondents-Appellees Utah Board of Oil, Gas and Mining and Utah Division of Oil, Gas & Mining

Denise A. Dragoo
James P. Allen
SNELL & WILMER, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101
Telephone: 801-257-1000
ddragoo@swlaw.com
jpallen@swlaw.com

Bennett E. Bayer, *pro hac vice*
LANDSRUM & SHOUSE, LLP
106 West Vine Street, Suite 800
Lexington, KY 40507
Telephone: 859-255-2424
bbayer@landsrumshouse.com

Jim R. Scarth
KANE COUNTY ATTORNEY'S OFFICE
76 North Main Street
Kanab, UT 84741
Telephone: 435-644-5278
attorneyasst@kanab.net

Attorneys for Respondents-Intervenors-Appellees

Stephen H.M. Bloch
SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 84111
Telephone: 801-486-3161
steve@suwa.org

Walton Morris, *pro hac vice*
MORRIS LAW OFFICE, P.C.
1901 Pleasant lane
Charlottesville, VA 22901
Telephone: 434-293-6616
wmorris@charlottsville.net

Tiffany Bartz
ATTORNEY AT LAW
213 Erie Street
Cambridge, MA 02139
Telephone: 510-701-1085
tiffbartz@gmail.com

Sharon Buccino, *pro hac vice*
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Avenue, N.W.
Suite 400
Washington, DC 20005
Telephone: 202-289-6868
sbuccino@ndrc.org

Attorneys for Petitioners-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Regulations

State Regulations

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Annotated §§ 40-10-14(6)(a), -30(3) (2011); *id.* § 78A-3-102(3)(e)(iv) (2011); and *id.* § 63G-4-303(1) (2011).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Relevant Standards on Review.

Under the Coal Act an appeal of a Board decision is subject to review according to the standards in Utah Code Ann. § 40-10-30. This section provides that judicial review is governed by the Utah Administrative Procedures Act, *id.* § 63G-4-303(1) (2011) ("UAPA"), as well as the enumerated standards in the Coal Act to the extent they are consistent with UAPA. *Id.* § 40-10-30(1) (Supp. 2008). Although the language of those two sections differs slightly, both UAPA and the Coal Act provide for a similar standard for appellate review.[1] Importantly, UAPA requires that a party be granted relief only if a person has been "substantially prejudiced" by agency error. *Id.* § 63G-4-403(4). The Board's interpretations of law and application of law to the facts will be set aside only if "clearly erroneous." *Id.* § 40-10-30-(3)(e) (Supp. 2008).

The Court reviews an agency's interpretation of law, including questions of statutory construction, for correctness. *Castle Valley Special Serv. Dist. v. Utah Bd. of Oil, Gas and Mining*, 938 P.2d 248, 252 (Utah 1996); *Bennion v. Graham Res., Inc.*, 849 P.2d 569, 570 (Utah 1993); *Associated Gen. Contractors v. Bd. of Oil, Gas and Mining*, 2001 UT 112, ¶ 18, 38 P.3d 291.

A mixed question of law and fact consists of "'the application of law to fact,' which asks 'whether a given set of facts comes within the reach of a given rule of law.'" *Martinez v. Media-Paymaster/Church of Latter-Day Saints*, 2007 UT 42, ¶ 26, 164 P.3d 384 (quoting *State v. Pena*, 869 P.2d 932, 935-37 (Utah 1994)). The Court will grant deference to an agency's interpretation of law or application of law to facts where the agency has been granted explicit or implicit discretion under a statute. *Wood v. Labor Comm'n*, 2005 UT App 490, ¶ 5, 128 P.3d 41. The Court grants particular deference to an agency's interpretation "where the agency possesses expertise concerning the operative provisions at issue, or where the agency is otherwise in a better position than the courts to assess the law due to its experience with the relevant subject matter." *Associated Gen. Contractors*, 2001 UT 112, ¶ 18. *See also Williams v. Pub. Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988); *Morton Int'l, Inc. v. Auditing Div.*, 814 P.2d 581, 586 (Utah 1991). And, when an agency is charged by statute to apply law to facts, particularly when the applicability of the legal rule depends on the combination of specific facts, such as the contents of a mining application, the agency's exercise of its discretion will be set aside as "an abuse of discretion only if 'the [agency's] action, viewed in the context of the language and purpose of the governing statute is unreasonable.'" *WWC Holding Co., Inc. v. Pub. Serv. Comm'n*, 2002 UT 23, ¶ 14, 44 P.3d 714 (*citing Morton Int'l,* 814 P.2d at 587 (internal citation omitted)).

---

[1] *Compare* Utah Code Ann. § 63G-4-403(4) *with* Utah Code Ann. § 40-10-30(3) (setting forth standards of review parallel to those found in UAPA).

An agency's factual findings will be affirmed only if they are supported by "substantial evidence when viewed in light of the whole record." Utah Code Ann. § 63G-4-403(4)(g); *Utah Chapter of the Sierra Club v. Air Quality Bd*, 2009 UT 76, ¶ 13, 226 P.3d 719. Substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *First Nat'l Bank of Boston v. Cnty. Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990). *See also Larson Limestone Co. v. State Div. of Oil, Gas & Mining*, 903 P.2d 429, 430 (Utah 1995); *Associated Gen. Contractors*, 2001 UT 112, ¶ 32. When reviewing an agency's decision under the substantial evidence test the reviewing court does not conduct a de novo review or re-weigh the evidence. *Associated Gen. Contractors*, 2001 UT 112, ¶ 21. When applying the substantial evidence standard to review of highly technical matters, the Board's findings of fact regarding areas of scientific or technical complexity or expertise will be reviewed on appeal with consideration for the expertise of the Board, *id.* at ¶ 18-19, and will be "accorded substantial deference, and 'will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible.'" *Larson*, 903 P.2d at 432 (quoting *Stokes v. Bd. of Review,* 832 P.2d 56, 60 (Utah App. 1992); *see also, Road Runner Oil, Inc. v. Bd. Oil, Gas, and Mining,* 2003 UT App 275, ¶15, 76 P.3d 692, 698 (2003).

To successfully challenge an agency's factual findings a party must marshal the evidence supporting the finding and then demonstrate that the findings are not supported by substantial evidence. *See Martinez*, 2007 UT 42 at ¶17. This rule applies to questions of fact and to mixed questions of law and fact. *Id.*

The Petitioners allege the Division failed to comply with the Utah Coal Mining and Reclamation Act, Utah Code Ann. §§ 40-10-1 to -30 (2004) ("Coal Act") and with its rules, Utah Admin. Code R645-100 to -402 (2009) ("Coal Rules") (collectively the "Utah Coal Program"), when it approved Alton Coal Development's ("Alton") application for a permit to conduct surface mining operations on 635 acres of private land near Alton, Utah. The Petitioners had the burden of proof at the hearing before the Board on each issue. (R. 466).

Issues Presented on Appeal.

Issue 1: Did the Board correctly determine that the Division and Alton fully identified and took into account the proposed mine's potential impacts on all historic and cultural resources in the permit and adjacent area as required by the Coal Act and the Utah Historic Site Protection statute, Utah Code Ann. § 9-8-404 (Supp. 2006).

Standard of Review: This issue raises questions of law regarding the requirements and definitions in the rules and statute; i.e. whether the regulations require a map of an adjacent area, and whether coal mining and reclamation operations include transportation of coal on public highways. This issue also raises mixed questions of law and fact regarding the application of the rules and statute to the facts; i.e., whether the Division properly identified and determined the potential impact of mining operations on cultural resources within the adjacent area as defined by the rules.

Issue 2: Did the Board correctly determine that the Division's Cumulative Hydrologic Impact Assessment ("CHIA") document satisfied the requirements of the

Coal Rules to establish criteria to be used in the design of the mine operations to prevent material damage to the hydrologic balance outside of the permit area.

Standard of Review: This issue raises as a question of law whether the rules require the CHIA to contain material damage criteria, and particularly material damage criteria that are a basis for enforcement of the Coal Act. This issue also raises mixed questions of law and fact regarding the Board's application of the law to the facts in finding that the Division's CHIA satisfied the requirements of the rule to design of the mine operations to prevent material damage to the hydrologic balance outside of the permit area.

Issue 3: Did the Board correctly find that the hydrologic monitoring plan, both on its own, and when read in conjunction with the permit application and the regulations, adequately describes how the monitoring data may be used to protect the hydrologic balance as required by the Coal Rules.

Standard of Review: This issue raises mixed questions of law and fact regarding the application of the requirement that the monitoring plan include a description regarding how monitoring data may be used to determine impacts the permit application, and whether the Board correctly determined that the monitoring plan and referenced documents when considered separately and in conjunction with the other portions of the permit application and the regulations adequately satisfied the rule. This issue also raises questions of fact concerning the information that is included in the monitoring plans and referenced documents and the information contained in the other portions of the permit application and the provisions of the regulations.

DETERMINATIVE LAW

The following determinative provisions are set forth in the Addenda as indicated.

Utah Code § 9-8-404 (Historic Resources) – Addendum 2

Utah Code § 40-10-11(2)(c) (Cumulative Hydrologic Impact Assessment) – Addendum 3

Utah Code § 40-10-30 (Judicial Review) – Addendum 4

Utah Admin. Code R645-100-200 (Definitions) – Addendum 5

Utah Admin. Code R645-300-133 to 133.600 (Findings of Fact) – Addendum 6

Utah Admin. Code R645-301-411.140 to -411.144 (Historic Resources) – Addendum 7

Utah Admin. Code R645-301-729.100 (Cumulative Hydrologic Impact Assessment) – Addendum 8

Utah Admin. Code R645-301-731.210 to -731.225 (Water Monitoring) – Addendum 8

STATEMENT OF THE CASE

I. Nature of the Case.

Petitioners appeal from an order issued by the Board ("Final Order") upholding the Division's decision to approve Alton's application for a permit to conduct surface coal mining operations because that application was complete and accurate and complied with all of the requirements of the Utah Coal Program (*see* Addendum 1).

II. Statement of Facts.

Alton filed its application, known as the Mining and Reclamation Plan or "MRP," seeking the Division's approval to conduct surface coal mining operations on an area of approximately 635 acres of privately owned coal and surface rights located near the

Town of Alton, Utah (approximately 35 miles south of Panguitch, Utah). (R.2963) (*See* Addendum 19). The proposed mining operations will strip overburden from the area to be mined, remove coal by scraper and truck, and reclaim the lands. (R.2985). The work will proceed on separate tracts of land, with lands already mined being reclaimed as mining on other tracts proceeds. (R.2388). The operator will use conventional earthmoving equipment with some blasting to mine about two million tons of coal per year. (R.2014, 5880 at 25). The entire life of the mine is expected to be about three and one-half years. (R.2968, 5880 at 23-25, Exhibit D1 Vol. 1 at 1-8). Alton proposes to haul the coal by truck to Cedar City, Utah via public highways including a portion of US 89 through the City of Panguitch, Utah, and portions of Interstate Highway 15. (R.5506).

The permit area is located in a dry mountain valley. There are no perennial streams within the permit area and only two intermittent or ephemeral drainages. (R.2972). The Lower Robinson Creek drainage traverses the northwest corner of the permit area and connects with Kanab Creek (the only perennial stream) about one mile west of the permit boundary (*Id*). The Sink Valley Wash drainage flows only in response to snow melt or storm events and traverses the eastern boundary of the permit area (*Id*). Ground water originates in the mountains to the east and emanates within the permit area along the eastern boundary in the form of small seeps and springs. (R.2979, 5882 at 407-09, Exhibit D1 Vol. 7 at 7-2 to 7-10 and at Drawing 7-1 (*see* Addendum 17)).

The mining plan calls for no water to be discharged from the permit area. (R.5878 at 438). All water used or developed during mining will be retained within the permit area for mine use, and all surface and ground water flowing toward the permit area will

be diverted or routed away from the mining operations. (R.5883 at 742-43). The permit application required two years of seasonal baseline data for water quality and quantity for surface and ground water resources in the permit and adjacent areas. (R.5878 at 612, *see also* Utah Admin. Code R645-300-728.100). Water monitoring is required to continue during mining and reclamation operations and through bond release. Utah Admin. Code R645-301-731 (2009); Exhibit D1 Vol. 7 at 7-57.

The permit area is primarily surrounded by federal lands that are underlain by unleased, federally-owned coal. (R.3001). Alton has also filed an application to lease approximately 3,600 acres of this federal coal, regarding which the BLM is preparing an Environmental Impact Statement (EIS)[2]. (R.2964, 5880 at 23-24). In conjunction with that federal EIS, Alton prepared a Comprehensive Resource Management Plan ("CRMP") which included comprehensive surveys of the cultural and historic resources on the federal lands surrounding the permit area and for the land within the permit area (*See* Exhibit D16).

The MRP consists of several volumes addressing specific requirements of the regulations (*See* Exhibit D1 at Vol. 1-7). Alton's predecessor first submitted the MRP to the Division on June 27, 2006, whose various technical experts reviewed the application according to their areas of expertise, such as wildlife, hydrology, geology and engineering to determine its adequacy. The application was reviewed and returned to Alton to be amended and resubmitted. This process continued several times until the Division determined the application was administratively complete. (R.2961).

Thereafter and pursuant to rule, the Division published notice of the application and held an informal conference in the town of Alton, Utah, on June 16, 2008. *See* Utah Admin. Code R645-300-121.300 (2009). Members of the public submitted comments. (R.2961).

After the informal conference, the Division continued its technical review of the application and Alton revised and reviewed the application several more times (*Id*). Before approving the application, the Division prepared a mandatory final technical analysis of the application's adequacy, and issued specific findings, including findings regarding the protection of cultural resources and the protection of the hydrologic systems in the permit and adjacent areas. *Id.* R645-300-133. The Division approved the application on October 19, 2009 (the "Decision"). (R.5493).

III. Course of the Proceedings and Disposition Below.

Petitioners filed their Request for Agency Action ("RAA") appealing the Decision to the Board on November 19, 2009. Alton was granted leave to intervene and the Division and Alton each responded. The Parties filed briefs regarding the scope of review, standard of review, and discovery. The Board ruled that it would hold a full evidentiary hearing and determine all legal and factual issues without deference to the Division's decision except for issues involving significant scientific or technical judgment. (R.464-69). The Board ruled that the Petitioners had the burden of proving the Division erred when it approved Alton's application. (R. 466).

---

[2] The EIS has not been issued.

Prior to the formal hearing the Petitioners submitted a statement of issues that identified seventeen alleged deficiencies. (R.1409-12). The Board heard testimony over five non-consecutive days: April 29 -30, May 21-22 and June 11, 2010. (R.5580-85). At the conclusion of the hearings the Board entered an Interim Order on August 3, 2010 addressing each of the identified issues with separate findings and conclusions and requested post-hearing briefs. (R.5454). The Board issued its Final Order on November 22, 2010 approving the permit application. (R.5585).

SUMMARY OF THE ARGUMENT

Petitioners raise three primary issues on appeal. These allegations have two commonalities:

First, they each allege a failure of process without any showing of *substantial prejudice* as UAPA requires. *See* Utah Code Ann. §63G-4-403(4).

Second, Petitioners improperly attempt to impose, as if they were binding, methodologies or interpretations upon the Division, the Board, and the Court that are not required by a plain reading of the Utah Coal Program. For example, to support their first claim that the Division failed to consider the historic and cultural resources in an "adjacent area," the Petitioners argue that the rules require the applicant to map such an "adjacent area." Simply put, the rules don't require a map or description of the adjacent area, and Petitioners point to no authority supporting their position. Similarly, Petitioners allege the federal rules require, and therefore that the Utah rules "mandate," the Division's Cumulative Hydrologic Impact Assessment ("CHIA") include specific

"material damage criteria" that can be used as an enforcement tool by citizen groups. The rules contain no such requirement, and the Office of Surface Mining ("OSM") has specifically rejected the Petitioners' argument regarding material damage criteria. Lastly, the Petitioners argue the hydrologic monitoring plan requires a distinct narrative statement, to be contained solely in the monitoring plan, demonstrating: (A) how "adverse impacts due to mining would be distinguishable from those due to other causes"; (B) how on the basis of "comparisons [that] can subsequently be made, the data can show the presence or absence of impacts; and (C) how ACD, the Division, and interested members of the public are to "judge the effectiveness of remedial measures and reclamation techniques." Pet. Brief at 32. Neither the Utah Coal Act nor its rules contain this comprehensive list of obligations, and although Petitioners insist Utah must adhere to this list in order to achieve consistency with the federal coal program, the federal rules also do not contain the list that Petitioners describe.

ARGUMENT

I. PETITIONERS' CLAIMS FAIL TO CONSIDER THE AUTONOMY AND DISCRETION SMCRA GRANTS TO THE DIVISION, BOARD, AND COURT TO ADMINISTER AND INTEPRET THE UTAH COAL PROGRAM

Before examining why Petitioners' three claims lack merit, it is important to note that Petitioners fail to acknowledge the legal relationship and interplay between the federal Coal Program and the Utah Coal Program under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201-1238 (2009). In fact, they ignore it. Importantly: (A) Utah has gained primacy under SMCRA and Utah law governs; (B)

Petitioners misuse the word "consistent" to claim state law must adhere to federal rules and OSM commentary on federal rules; and (C) Petitioners ignore the deference SMCRA and Utah laws grant to the Division and Board to interpret and apply the Utah Coal program.

A. Under the inherent federalism of SMCRA the Utah Coal Program has gained primacy and is the operative law for regulating coal mining operations in Utah.

SMCRA provides that if a state enacts a regulatory program that is at least as stringent as the federal requirements the state can "assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations." 30 U.S.C. § 1253(a). When that occurs, the state obtains primacy and "responsibility for regulating mining, subject to [OSM] oversight"[3] and the state statutes and regulations become the direct authority for regulating coal mining. *Id.*; *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001) (where there is an approved plan, SMCRA delegates exclusive authority to the states and the state law becomes the operative law). After a state gains primacy the sole purpose of Federal law is "to provide the 'blue print' against which to evaluate the State's program" but [Federal] laws "drop out" as operative provisions. *Id.*

Since 1981, Utah has been qualified for primary enforcement authority by OSM and the Utah Coal Program has been the operative program regulating coal mining in the

[3] OSM's oversight is limited. "Once a state program has been approved, the state regulatory agency plays the major role, with its greater manpower and familiarity with local conditions. It exercises front-line supervision, and the Secretary of Interior will not intervene unless its discretion is abused." *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 523 (D.C. Cir. 1981). Federal laws are reengaged and supercede

state. 30 C.F.R. § 944.10 (2009); 46 Fed. Reg. 5,899 (Jan. 21, 1981) (granting primacy); 60 Fed. Reg. 37,002 (July 19, 1995). This Court has held that "[s]tate statutes and regulations thus become the direct authority for regulating coal mining," *Castle Valley Special Serv. Dist.*, 938 P.2d at 251, and are the operative law to be interpreted by Utah courts. *Id.* Thus, within the general constraints of SMCRA, this Court may review this appeal without mandatory obeisance to the decisions of federal agencies or federal courts interpreting and applying the federal rules. *State v. Mooney*, 2004 UT 49, ¶ 25, 98 P.3d 420 ("[A]lthough we are free to consider the interpretation of a federal agency, we have no obligation to defer to that interpretation."); *Bragg*, 248 F.3d at 295 ("[W]hen a State's program has been approved by the Secretary of the Interior, we can look only to State law on matters involving the enforcement of the minimum national standards") (citing *In re Permanent Surface Mining Regulatory Litigation*, 653 F.2d 514, 519 (D.C. Cir. 1981)).

B. Petitioners incorrectly argue that state law must be "consistent" with SMCRA and its implementing rules, and that this consistency requires this Court to defer to federal rules, interpretations and comments.

Congress has not issued uniform laws throughout all fifty states concerning coal mining regulation nor mandated enforcement of federal regulations. Instead, Congress allows states with primacy to enact and enforce their own regulations. In their statement of the standard of review and elsewhere, Petitioners argue that this Court cannot lawfully interpret state regulations in a manner that is inconsistent with, or deviates from, the federal statutes, including SMCRA and the National Historic Preservation Act

---

state laws only following OSM's instigation of a § 1271 enforcement proceeding. *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001).

("NHPA"), or their implementing regulations. Pet. Brief at 4, 22, 25, 28, and 31-32 (citing 30 C.F.R. § 733.11; *Brown v. Red River Coal Co.,* 373 S.E.2d 609, 610 (Va. App. 1988); *Shultz v. Consolidation Coal Co.,* 373 S.E.2d 467, 469 (W. Va. 1996)). While Petitioner's correctly cite the "consistency" language, their argument incorrectly uses the word "consistent" to suggest a higher degree of conformity than SMCRA requires. SMCRA gives the word "consistent" a specific meaning that respects state autonomy. "Consistency" does not require that a state adopt verbatim the federal rules or adhere to federal interpretations of those rules. Instead, the federal regulation provides:

> Consistent . . . mean[s]:
>
> (a) With regard to the Act, the State laws and regulations are *no less stringent* than, meet the minimum requirements of and include all applicable provisions of the Act.
>
> (b) With regard to the Secretary's regulations, the State laws and regulations are *no less effective* than the Secretary's regulations in meeting the requirements of the Act.

30 C.F.R. § 730.5 (2009) (emphasis added).

The Fourth Circuit Court of Appeals, in a broad overview of SMCRA regulations and delegation of authority to states, rejected the view that state rules must be the same as federal rules to be "consistent" with them. *See Bragg*, 248 F.3d at 295. The court explained that requiring actual consistency with federal rules "would circumvent the carefully designed balance that Congress established between the federal government and the States because the effect of a citizen suit to enjoin officials in a primacy State to comport with the *federal* provisions establishing the core standards for surface coal

mining would end the exclusive State regulation and undermine the federalism established by the Act." *Id.*

Petitioners' claim that the Division and Board must adhere to the federal interpretations of the federal rules to be "consistent" is incorrect. The Court should reject it.

C. Petitioners ignore the deference granted by SMCRA and Utah law to the Division and the Board to interpret and apply the Utah Coal Program.

SMCRA and its regulations do not always set out an explicit method or standard for the regulatory agency to follow in order to make a required finding. The Utah Coal Act and its OSM-approved regulations often expressly or implicitly require the Division and the Board to exercise professional judgment, technical expertise, and discretion when interpreting and applying the rules to the facts of a particular situation.

Utah courts have held that when an agency is charged by statute with the application of the law to the facts, particularly when the applicability of the legal rule depends on reviewing a combination of facts, there is an implicit grant of discretion to the agency. *See Morton*, 814 P.2d at 586; *WWC Holding*, 2002 UT 23, ¶ 11; *Martinez*, 2007 UT 42, ¶ 26; *Wood*, 2005 UT App 490, ¶ 5; *King v. Indus. Comm'n*, 850 P.2d 1281, 1286 (Utah App. 1993). This rule is particularly applicable "where the agency possesses expertise concerning the operative provisions at issue, or where the agency is otherwise in a better position than the courts to assess the law due to its experience with the relevant subject matter. *Associated Gen. Contractors*, 2001 UT 112, ¶¶ 18-19; *see also Williams*, 754 P.2d at 50; *Morton,* 814 P.2d at 586. The exercise of the agency's discretion will be

set aside as "an abuse of discretion only if 'the [agency's] action, viewed in the context of the language and purpose of the governing statute is unreasonable.'" *WWC Holding*, 2002 UT 23, ¶ 14 (quoting *Morton,* 814 P.2d at 587 (internal citation omitted)).

For over 30 years the Division has administered the Utah Coal Program and relied on its technical experts to apply the rules, to review applications, and to enforce the regulations. Moreover, by statute, the Board of Oil, Gas and Mining is composed of seven individuals selected based on their expertise and experience in mining, geology, ecological and environmental matters and other areas. Utah Code Ann. §§ 40-6-4, -6 (Supp. 2009). In their review of the Alton application, the Division and Board used their technical expertise and professional judgment to apply the provisions of the Utah Coal Program to Alton's application. As a technical application of law to the facts and under the relevant precedent, those decisions should be given deference and reviewed by this Court only for abuse of discretion.

II. THE BOARD CORRECTLY DETERMINED THE DIVISION IDENTIFIED AND PROTECTED THE HISTORIC RESOURCES IN COMPLIANCE WITH THE COAL ACT AND THE UTAH HISTORICAL SITE PROTECTION LAW.

Petitioners incorrectly claim the Division failed to properly identify and protect cultural resources in accordance with the Coal Act and the Utah Historical Site Protection statute. SMCRA's requirements for identification and protection of cultural and historic properties as enacted by the Utah Coal Program are found at Utah Admin. Code R645-301-411.140 through 140.144. These rules require three steps: (A) identification of cultural or historic sites within the permit area and adjacent area that will be affected by

mining operations, Utah Admin. Code R645-301-411.140 (2009) (sites must be listed or eligible to be listed on National Registry of Historical Sites); (B) a description of coordination with the State Historic Preservation Officer ("SHPO"), *id.* R645-301-411.142 (2009); and (C) the potential adoption of appropriate mitigation and treatment measures for the identified and affected sites, *id.* R645-301-411.144 (2009). The requirements of Utah's Historic Sites Protection statute, Utah Code Ann. § 9-8-404 (Supp. 2006), are parallel to the requirements of the Coal Act.[4] Those requirements were fully met.

A. The Division properly identified the cultural and historic sites within the permit area and adjacent area.

The Coal Rules require maps[5] that identify, and a narrative that describes, the nature of the cultural and historic *sites* within the "permit area" and "adjacent area." Utah Admin Code R645-301-411.140 to 141 (2009). Although the maps must be sufficiently

---

[4] The Historic Sites Protection statute requires that before a state agency can issue a permit or undertaking it must: identify properties listed or eligible for listing on the National Register or the Utah State Register of Historic Places that may be affected by mining; take into account the effect of the permit or undertaking on the properties; and allow an opportunity for the SHPO to comment on the agency's determination to concur with their conclusion or not. *See* Utah Code Ann. § 9-8-404(1)(a) (2009). No regulations have been adopted interpreting the Historic Site protection statute and federal rules do not apply.

[5] That mapping requirement includes identifying: (1) "boundaries of any public park and *locations* of any cultural or historical resources listed or eligible for listing . . . and known archeological sites *within the permit and adjacent areas,*" Utah Admin. Code R645-301-411.141.1(2009)(emphasis supplied); (2) "[e]ach cemetery that is located in or within 100 feet of the proposed permit area," Utah Admin. Code R645-301-411.141.2 (2009; and (3) "[a]ny land within the proposed permit area which is within the boundaries of any units of the National System of Tails or the Wild and Scenic Rivers System . . . ." Utah Admin. Code R645-301-411.141.3 (2009). These are the only mapping requirements

large to identify any *sites* that are found within the permit area and any adjacent area, *there is no requirement to plot the boundaries of an "adjacent area."*

The "permit area" generally consists of the disturbed area and includes both the area to be mined and lands that may be used in association with mining activities. Utah Admin. Code R645-100-200 (2009) (defining "permit area"). The permit area is the area tied to the surety and the obligation of the operator to reclaim the land. *Id.* The permit area is required to be shown on most of the maps for the permit application. In contrast, an "adjacent area" does not refer to one particular area applicable to the permit, but to areas of differing sizes and locations depending on the resources involved. The purpose of the adjacent area analysis is to identify *resources or sites* outside the permit area that may be impacted by mining operations. The definition provides:

> 'Adjacent Area' means the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations, including probable impacts from underground workings.

Id. R645-100-200 (2009) (defining "adjacent area"). Again, the regulations require identifying all listed and eligible *sites* within this "adjacent area" (i.e. within an area where sites are expected to be adversely impacted), but do not require the plotting of an outer boundary line of any "adjacent area."

Alton's mine permit application was unusual in its analysis of cultural resources because of the extensive amount of land already surveyed by the Cultural Resource

---

related to cultural resources. There is no requirement for an adjacent area map for historic or cultural resources.

Management Plan (CRMP). The CRMP identified cultural resources for the proposed mine application and for the federal lease application. (R.5880 at 156-59, 5881 at 273-74, Exhibit D15). The surveys covered over 3,840 acres and included a literature search and three ground surveys conducted by professional archeological consultants. (R.5881 at 366, 381 and 387, Exhibit D17, Exhibit D19). The surveys proceeded in three phases: the privately owned coal lands within the permit area; the BLM coal lands contiguous with the permit area; and a supplement for additionally requested lands. (R. 5881 at 273, 368-69 and 387,5880 at 156-59, Exhibit D15). The surveys eventually included all of the lands surrounding the mine and within the permit area. (R.5880 at 161 and 167, 5881 at 378-87, Exhibit D19). The consultants filed reports, including maps and narrative descriptions, for at least 90 sites described as mostly "artifact scatters" that did not include sensitive structures or petroglyphs. (R.5881 at 383-84, Exhibit D19). This extensive effort to identify cultural resources in the vicinity of the proposed mine resulted in maps which fully comply with the Coal Rules by depicting all *resources or sites* falling within the "permit area" and "adjacent area" as those terms are defined in the regulations. (*See e.g.,* Addendum 14). Nothing further is required.

B. The Division properly coordinated with the SHPO regarding identified cultural and historic sites.

Utah's Historic Sites Protection statute, requires that a state agency "allow the state historic preservation officer a reasonable opportunity to comment with regard to the

undertaking or expenditure." Utah Code Ann. § 9-8-404(1)(b) (Supp. 2006).[6] The Utah Coal program, in turn, requires the application to "describe coordination efforts with and present evidence of clearances by the SHPO." Utah Admin. Code R645-301-411.142 (2009).[7]

The Division identified eligible properties and consulted with SHPO regarding the potential for effect in two separate notices. On November 20, 2007, based on then completed surveys of the sites, the Division advised the SHPO of sites it deemed eligible for listing and potentially affected by the proposed mine. (Exhibit D12). This notice identified 15 total sites of which 14 were found to be eligible for listing on the National Register of Historic Places. The notice also referenced a map that showed the permit area and the surrounding lands and identified the referenced sites. Those sites included sites on the periphery of the permit area that extended beyond the permit boundary. Seven of the identified sites were expected to be affected. (R.5880 at 167-69, Exhibit D12). The SHPO concurred in the Division's identification, its determination of eligibility for listing, and the identification of sites that might be impacted by the proposed mine permit. (R.5880 at 170, Exhibit D13).

Subsequent to the approval of the permit, Alton advised the Division that two surveyed sites had not been identified to SHPO due to an oversight by Alton's consultant.

---

[6] Since this mine is located entirely on privately-owned land, will mine private minerals, and does not require any federal rights-of-way or other federal approvals, the SHPO's role is limited to the requirements of Utah law and does not involve the National Historic Preservation Act (NHPA).

An additional Cultural Resource Inventory (Exhibit D19) related to these sites was submitted to the SHPO on April 21, 2010 together with the Division's request for concurrence in its identification of eligibility and effect for these two sites. (Exhibit D-20). The SHPO concurred by letter dated April 22, 2010. (Exhibit D-21; R.5880 at 241-45).

In summary, all of the survey maps submitted with reports were included in the permit application and were provided to SHPO. Those maps showed all of the sites identified by the surveys that were subject to being affected. (R.5881 at 368-36, 372, Exhibit D12, Exhibit D17). The Division determined that sites identified and shown on the surveys that were further away from the permit area than those already identified on the periphery would not be affected (i.e., they fell outside the "adjacent area" as defined in the regulations) and were not included in the identification for SHPO. Based on those documents and that reasoning, Alton complied with, and the Division properly approved, the identification of all archeological sites within the permit area and adjacent area. Petitioners' converse claim is in error. It should be rejected.

C. The Division properly provided for, and coordinated with SHPO regarding, mitigation of the identified cultural sites in the adjacent area.

Petitioners' erroneously claim the Division did not provide for, and coordinate with SHPO regarding, mitigation of the identified cultural resources in the adjacent area. The Coal Rules and Utah's Historic Sites Protection statute authorize the Division to

---

[7] The SHPO will either "concur" with the agency's proposed action to "take into account" the effect of the undertaking or follow an internal procedure for filing its

require the applicant to protect historic or archeological properties listed or eligible for listing "through appropriate mitigation and treatment measures." Utah Admin. Code R645-301-411.144 (2009). The Division is also required, prior to approving a permit application, to make a written finding that:

> [t]he Division has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions or changes in operation plan protecting historic resources, or a documented decision that the Division has determined that no additional protection measures are necessary . . .

Utah Admin. Code R645-300-133.600.; *see also* Utah Code Ann. § 9-8-404 (Supp. 2006) (requirements for state agencies prior to approving the expenditure of state funds).

In accordance with those rules, on July 10, 2008, the Division asked the SHPO to concur in the mitigation it proposed for the seven eligible and affected sites. (R. 5880 at 176-78, Exhibit D15). The Division based its initial determination of potential for impacts from mining operations on the direct destruction of the sites either by actual earth moving for mining operations or by the construction of roads, buildings and facilities. The Division proposed two main types of mitigation: that the locations would be studied, information documented, and materials recovered; and that sites not within the path of surface disturbing activities be marked and avoided. (R.5880 at 187-88, Exhibit D15 at 2). The SHPO concurred in those proposed mitigation and treatment measures. (R.5880 at 177-78, Exhibit D15 at 3).

---

objections and making further analysis. Utah Code Ann. § 9-8-404(2)(a) (Supp. 2006).

As part of this process SHPO also indicated that Alton would need to avoid the two previously omitted sites or be required to provide other mitigation for SHPO's approval. (Exhibit D21, 22). The Division in turn added that requirement as a condition to the permit in accordance with the provisions of Utah Admin. Code R645-301-411.100 (2009).[8] (R. 5880 at 242-46, Exhibit D20).

At the hearing, the Division's permit supervisor explained that it was not reasonable to expect that mining operations would produce vibration or dust that would damage the "lithic artifact" type of sites and that such sites would only be damaged by direct disturbance. Since the SHPO had concurred in its determination that sites on the boundary of the permit area[9] that would be avoided would not be affected, the Division determined it was reasonable to conclude that any sites further away from the permit area than those on the periphery identified to the SHPO would not be impacted by the proposed mining. Based on these facts, the Board rationally and correctly applied the definition of "adjacent area" and the other requirements of the Coal Program, and

---

[8] When adding this condition, the Division's counsel asked if the SHPO would concur with the Division's determination of eligibility and effect for the sites on lands adjacent to the permit area (Exhibit D21). The SHPO did not address the inquiry in its response. (Exhibit D22). Petitioners suggest this implies the SHPO did not agree with the Division's conclusion about the adjacent area. However, the SHPO did not indicate it disagreed but merely refused to comment. The Division believes the SHPO was correct to refuse to affirm or deny the Division determination. The SHPO's role under its mandate is limited to concurrence with regard to the sites identified and the actions proposed, and does not include concurrence in the Division's determination of the extent of the "adjacent area."

[9] Among the sites located on or extending over the permit area boundary as shown on the map accompanying the November 20, 2009 letter to the SHPO were sites that extended as much as 200 feet for one site and 1000 feet for another beyond the permit boundary.

concluded the Division had complied with its obligations to identify and consult with the SHPO on all sites within the permit area and any adjacent area.

D. Both the 'permit area' and 'adjacent area' definitions exclude the Panguitch National Historic District from the Division's required consideration of impacts to cultural resources.

At the Board hearing below, Petitioners argued that the Division failed to adequately address the impact of mining on the Panguitch National Historic District ("PNHD"). Petitioners have not explicitly made this argument on appeal. Petitioners have argued, however, that the possibility of truck traffic having an impact upon the PNHD illustrates the importance of the "adjacent area" analysis in general. Pet. Brief at 18.

Since an "adjacent area" is an area where it is reasonable to expect adverse impacts from "proposed coal mining and reclamation operations," identification of an adjacent area is limited by the definition of "coal mining and reclamation operations." Utah Admin. Code R645-100-200 (2009). Surface coal mining and reclamation operations are defined in the Coal Act and rules and include (a) specific activities conducted on the surface of the lands, and (b) areas where the activities identified in part (a) of the definition disturb the natural land surface. Utah Code Ann. § 40-10-3(20) (2004); Utah Admin. Code R645-100-200 (2009). The definition of 'affected area' further defines the areas affected by mining activities. Each definition excludes the hauling of coal on roads built and maintained with public funds and used primarily by the public. Utah Admin. Code R645-100-200 (2009) (defining "affected area"). This interpretation of the definition of "coal mining and reclamation operations" was upheld

by the Board based on the applicable regulatory definitions and upon the holding of *Harman Mining Corp. v. Office of Surface Mining*, 659 F. Supp. 806 (W. D. Va. 1987).[10] "Coal mining and reclamation operations" do not include truck transportation of coal on public roads. Petitioners do not challenge this legal conclusion on appeal.

The Division correctly determined that the PNHD was beyond any reasonable adjacent area and that there was no need to assess the impact of coal mining on the area for two reasons: (A) the great distance (approximately 35 miles) from the mine permit boundary and the lack of potential for any direct effect from operations upon cultural resources in the city of Panguitch, and (B) the Coal Act and regulations do not provide any authority to regulate the transportation of coal on public highways. Petitioners have not and cannot show that determination was in error. The Court should uphold it here.

III. THE BOARD CORRECTLY FOUND THAT THE DIVISION'S CUMULATIVE HYDROLOGIC IMPACT ASSESSMENT SATISFIED ALL OF THE REQUIREMENTS OF THE COAL ACT AND RULES

Petitioners claim the Board erred in upholding the Division's Cumulative Hydrologic Impact Assessment ("CHIA"). Specifically, Petitioners assert that the CHIA analysis required the Division to formulate and apply "site-specific material damage criteria" and that by failing to do so the Division failed to establish a rational basis for determining the mine was designed to prevent such damage as required by Utah

[10] The Court construed the parallel federal definitions to conclude that the use of public roads for transportation of coal was not a "coal mining and reclamation operation" and that such roads were not part of the permit area and not regulated by the state.

Administrative Code R645-301-729.100 (2009). Pet. Brief at 20.[11] To understand Petitioners' argument it is necessary to understand that Petitioners ascribe a specific and novel meaning to the term "material damage criteria." Petitioners read that term to mean water quality or quantity conditions that when observed constitute a finding that "material damage to the hydrologic balance caused by mining operations" *has occurred.* (R.5883 at 655-56). As Petitioners' understand it, an observed measurement in excess of the material damage criteria is a violation of the Act or the permit and justifies enforcement action by the regulatory agency or by citizens' suit. The meaning that Petitioners elect is not found in or implied by the language of the state or federal rules.

Petitioners' claims lack merit because: (A) the CHIA is a not an *enforcement* tool but a *design* tool intended to inform the scope and content of the mining operation plan in order to design the operations to prevent material damage; (B) Petitioners' definition lacks support in the federal rules, federal guidance documents, the OSM's comments, and decisions by the courts; and (C) the criteria the Division established satisfy the requirements of the rules and relevant law.

A. The CHIA is a permit requirement intended to determine that mining operations have been designed to prevent material damage to the hydrologic balance outside the permit area.

[11] In Petitioners' original identification of the issues to be presented at the Board hearing, they claimed the Division's CHIA was deficient because it did not have a material damage criteria for each water quality parameter monitored, and because it did not use the State's water quality limit for TDS as the criteria. (R.5883 at 532, 1409, 5610-17). The testimony of the witnesses at the hearing was focused on these (unappealed) issues and not on the argument Petitioners now make.

Before addressing the details of the CHIA, some regulatory background is helpful. When reviewing a surface mining application the Division adheres to a statutory and regulatory framework designed to assure that "[a]ll coal mining and reclamation operations will be conducted to minimize disturbance to the hydrologic balance within the permit and adjacent areas, [and] to prevent material damage to the hydrologic balance[12] outside the permit area . . . ." Utah Admin. Code R645-301-750 (2009).

To meet those objectives, operators conduct and include in their permit application a "determination of the probable hydrologic consequences ["PHC"] of the mining and reclamation operations, both on and off the mine site with respect to the hydrologic regime." Utah Code Ann. § 40-10-10(2)(c)(i)(A) (Supp. 2006); *see also* Utah Admin. Code R645-301-728.100 (2009). The PHC is based on a baseline of hydrologic, geologic, and other information and must assess and make findings on a number of factors.[13] The Division then reviews the operator's PHC and findings and conducts a Cumulative Hydrologic Impact Assessment ("CHIA"). The CHIA is a permitting requirement intended to aid in the planning and design of the mining operation plan. *See*

---

[12] "Hydrologic balance" means the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage." Utah Admin. Code R645-100-200 (2009) (defining "hydrologic balance").

[13] Factors include, among others, whether adverse impact to the hydrologic balance may occur; whether acid or toxic-forming materials are present and could contaminate local waters; what impact the proposed operations will have on sediment yield, water quality parameters, flooding or stream flow alteration; whether the surface operation will impact underground or surface waters that is used or domestic, agricultural, industrial, or other legitimate purposes; and whether they will result in contamination, diminution, or

Utah Admin. Code R645-301-731 (2009). The CHIA's primary objective is to consider all future and existing coal mining in the area and to look at impacts that may occur as a cumulative result of all mining, including the proposed mine.

No rule specifies the process or steps to be used by the Division to prepare a CHIA. The entirety of the regulations governing preparation and contents of a CHIA are contained in a single rule:

> The Division will provide an assessment of the probable cumulative hydrologic impacts of the proposed coal mining and reclamation operation and all anticipated coal mining and reclamation operations upon surface- and ground-water systems in the cumulative impact area. *The CHIA will be sufficient to determine, for purposes of permit approval whether the proposed coal mining and reclamation operation has been designed to prevent material damage to the hydrologic balance outside the permit area.* The Division may allow the applicant to submit data and analyses relevant to the CHIA with the permit application.

Id. R645-301-729.100 (2009) (emphasis added). There are no other relevant regulations. Neither SMCRA nor the Coal Program include a definition of "material damage criteria" or of "material damage" as used in the CHIA. *See Id.* R645-100-200 (2009) (for absence of definitions).

OSM developed draft guidelines that set forth non-binding steps that *may* be used to guide an agency's preparation of a CHIA.[14] (Exhibit D26 at 03298). The guidelines emphasize that they are intended to give the regulatory agency "flexibility to administer

---

interruption of groundwater or surface water in the permit or adjacent area. Utah Admin. Code. R645-301-728.100 to .400 (2009).

[14] DRAFT Guidelines for Preparation of Cumulative Hydrologic Impact (CHIA) (December 1985). These draft guidelines have never been issued in a final form. The Introduction provides "These suggestions and procedures should be considered

the process" and to "choose the specific approaches and methods that will be most appropriate to a given State, region, or cumulative impact area." (Exhibit D26 at 03303). These general guidelines provide an agency may "establish threshold values beyond which material damages is *likely to occur.*" (Exhibit D26 at 003311) (emphasis added). Such thresholds, the guidelines suggest, are "needed for comparison with the predicted impacts of mining" so the "*potential* for material damage may be assessed." (Exhibit D26 at 003341)(emphasis added). Thus, contrary to Petitioner's unsupported reading of the term "material damage criteria," the selected criteria merely assess the *potential* for material damage, and are not themselves a basis for concluding that material damage has occurred and that a mine is in violation.

In practical application, an observation of a condition that indicates CHIA thresholds have been exceeded alerts the Division to the status of the hydrologic balance surrounding the mine but does not indicate the source or cause of the imbalance. Such an observation also does not indicate the duration of the event. Alerted to the potential for material damage, the Division will conduct an investigation to determine the source of the problem, which could be related to mining operations, a natural condition such as a storm event, or a temporary event that may have ceased. (*See* R.5883 at 604-05). Again, contrary to Petitioners' position, exceeding a material damage criteria does not automatically indicate that the mine is in violation.

---

guidelines and are not standards. The regulatory authority is not required to use this material." (Exhibit D-26 at 03302).

The CHIA rule itself states that it is to be used to evaluate the proposed mining operation's "design" as part of the permit approval process. Utah Admin. Code R645-301-729.100. Reaching a CHIA threshold is not a stand-alone basis for or means of enforcement, but is at most a precursor to an enforcement action if the Division's analysis concludes the negative impact was a consequence of mining.

The Division explained this design vs. enforcement tool distinction through the testimony of April Abate:

> Mr. Morris: The CHIA doesn't say, though, does it that ACD will be required to take remedial measures at that point?
> Ms. Abate: That's not something the CHIA is required to do. That would be something in their permit. It's something in their permit, or it would be something that the Division would require in the form of a Division Order.
> Mr. Morris: But the CHIA does not set a specific point at which ACD must take preventative or remedial measures, does it?
> Ms. Abate: No CHIA's don't address that.

(R.5883 at 604-05.)

As Abate stated, if a CHIA threshold is met and a Division investigation determines an enforcement action is needed, the Division follows the established enforcement provisions at Utah Admin. Code R645-400-100 to -402-500 (2009), which can include ordering mining to stop.

Petitioners ignore this testimony and ask the Court to find that when a CHIA material damage criteria is observed it constitutes material damage and thus a violation and a basis for stopping mining. Such a result would give the citizen group additional leverage to require cessation of mining or other action. But SMCRA never intended the CHIA (a design tool) to be used as an enforcement tool in this way. The Coal Act and

the CHIA rule unambiguously require that the CHIA is to be sufficient to determine if the mine *has been designed* to prevent material damage. The Division must make a finding that the proposed mine meets this requirement before the application can be approved. This crucial distinction between the actual regulatory purpose of a CHIA as a design tool and Petitioners' claim of inadequacy is best explained by the testimony of the Petitioners' hydrologist Chuck Norris in response to the same question from Petitioners' counsel.

> Mr. Morris: Is the 3000 milligrams per liter indicator a material damage criterion?
> Mr. Norris: No. It appears to be a threshold value that raises the specter that material damage might be occurring, and it will elicit some evaluation of that possibility. But it, itself, is not considered a -- - reaching that 3000 is not, as laid out here, a material damage criteria in and of itself.
> Mr. Morris: What's the difference?
> Mr. Norris: A violation - - exceeding a material damage criteria is something that is prohibited under the Surface Mining Law. Reaching this 3000 is not considered, or described as being an actionable condition. It is an evaluation point."

(R.5883 at 655-56).

Petitioners' view is not mandated by the Utah Coal Program or the federal rules. Rather, as the plain reading of the rule makes clear, the CHIA is a design tool and while it may be a precursor to an enforcement action brought under the enforcement rules, meeting a material damage criteria does not trigger an automatic enforcement action.

B. Petitioners' definition of "material damage criteria" has already been rejected by OSM and case law.

In support of their position that a specific type of "material damage criteria" and methodology are "required," Petitioners rely on the preamble explanations associated with the adoption of the final federal rules at 48 Fed. Reg. 43,973 (Sept. 26, 1983). That preamble, while helpful to explain the intent of the federal agency in adopting the federal

rules, is not binding. Petitioners severely overstate their claim that OSM requires an enforcement style "material damage criteria." Their cited authority does not support, and in fact specifically rejects, Petitioners' definition of "material damage criteria."

Contrasting the Petitioners' assertions, the Secretary's statements grant flexibility to the states and provide that it is up to the local regulatory authorities to adapt their CHIA to the area and operations on a site-specific basis. In response to a comment that OSM should delineate "a methodology for preparing a CHIA," OSM replied that:

> It is *inappropriate* to dictate methodologies of CHIA analysis in a regulation of nationwide application. Although some CHIA criteria will be generally applicable, others will be of local value. Therefore, *each regulatory authority must adopt a CHIA methodology when reviewing a permit application which will reflect the particular hydrologic and geologic conditions* in their areas of concern.

48 Fed. Reg. 43,973 (Sept. 26, 1983) (emphasis added).

In addition to the federal rule and preamble, the Petitioners cite the comments of OSM in approving a revision to a portion of West Virginia's regulatory program. Pet. Brief at 21; 73 Fed. Reg. 78,974 (Dec. 24, 2008). Those comments do not have the force of law; moreover, it is important to note that OSM expressly rejected Petitioners' view that a CHIA requires enforceable "material damage criteria."[15] OSM in fact approved the *removal* of a definition of material damage similar to what Petitioners contend is required

---

[15] OSM has not only rejected views similar to Petitioners' views in this case, but OSM has specifically rejected these same arguments when brought *by Petitioners' counsel.* For example, in their discussion of public comments section OSM states "extensive comments were received from Walton D. Morris on behalf of Ohio Valley Environmental Coalition (OVEC)," and then OSM proceeds to review and reject each of OVEC's arguments noting that "OVEC vastly overstates the Federal mandate." 73 Fed. Reg. 78,976- 77 (Dec. 24, 2008).

under Utah's regulatory program. In this instance, West Virginia sought OSM's approval to eliminate the following self-effectuating material damage language from its rules: "[w]hen the magnitude of cumulative impact exceeds threshold limits or ranges as predetermined by the Division, they constitute material damage." 73 Fed. Reg. 78,974 (Dec. 24, 2008).

In approving this deletion, OSM applied the appropriate standard of review for analyzing actions taken by a state program by concluding:

> " . . . we find that the deletion of the definition does not make the State program *less effective* than the hydrologic protection requirements set forth in the Federal regulations *nor less stringent* than those in SMCRA, and its removal can be approved."

73 Fed. Reg. 78,974 (Dec. 24, 2008) (emphasis added)[16].

When this rulemaking action was challenged in federal court, Petitioners views were again rejected: "In contrast, Plaintiffs' attempt to have every violation of water quality standards, no matter how temporary or minor, qualify as material damage impermissibly conflates the requirements of the [Clean Water Act] with what is, ostensibly, a design tool for the SMCRA." *Ohio River Valley Envtl. Coal., Inc., v. Salazar*, No. 3:09-0149, 2011 WL 11287, 7 (S.D.W.Va. Jan. 3, 2011) (4th Cir. appeal docketed Jan. 19, 2011) (Addendum 10).

---

[16] To approve the removal of this language OSM looked to the history of the federal regulations and stated:

> "in the 25 years since the hydrology rules were revised [1983], *OSM has not put States on notice, under 30 CFR Part 732, of an obligation to establish material damage criteria* or that 30 CFR § 816.42 or 817.42 must be used for such criteria. 73 Fed. Reg. 78,974 (Dec. 24, 2008) (emphasis added).

C. The Division properly established threshold limits and identified material damage criteria to properly assess Alton's mining operation plan to ensure it is designed to prevent material damage to the hydrologic balance.

In contrast to Petitioners' claim that this court should determine whether the CHIA is an adequate *enforcement tool*, the statutory requirement is whether the Division's CHIA was "sufficient to determine, for purposes of permit approval whether the proposed coal mining and reclamation operation has been designed to prevent material damage to the hydrologic balance outside the permit area. . . ." Utah Admin. Code R645-301-729.100 (2009) (emphasis supplied); *see also* Utah Code Ann. § 40-10-11(2)(c) (requiring that the proposed operation prevent material damage to the hydrologic balance). The proper question then, is whether the Division correctly determined that the Division's CHIA set adequate thresholds or criteria to indicate to the Division whether the hydrologic balance in the area surrounding the mine is being negatively affected and necessitates further investigation. The Division properly established those thresholds and properly determined that Alton's mine plane was designed to prevent damage to the hydrological balance.

The Division's CHIA runs 53 pages and contains eight substantive sections required by the rule. (Exhibit D23). This document was reviewed in detail during the testimony and cross examination of April Abate, Division Hydrologist. (*See* R.5883 at 580-610). As can be seen from merely examining the index, the Division's CHIA covered each of the subjects required by the rule. (*See* Exhibit D23). The portions

relevant to Petitioner's current claim are found in the Material Damage portion of the CHIA at pages 39 to 41 and explain the risks to the hydrologic balance from mining. The CHIA states:

> The direct effect of mining on the hydrology of the area is mainly focused on determining and managing the limited amount of water that is available for present uses. This means that the quantity, quality and distribution of the water must be maintained at minimum present levels. The specific objectives of this CHIA used to evaluate material damage are:
>
> 1. Determine any changes in the quality of water that reaches the off-permit stream systems
> 2. Evaluate the sediment load to the stream system during and after mining and reclamation"

(Exhibit D23 at 39).

Specifically with regard to total dissolved solids ("TDS") there is a discussion of the high background level of TDS in the receiving streams and groundwater and a conclusion that in order to observe adverse impacts from mining, a level higher than the water quality standard was required to be selected as a "threshold parameter" (Exhibit D23 at 40-41) In the conclusion of the discussion, the Division unambiguously sets out material damage criteria for levels of TDS in the surface and ground water as follows:

> As a result a material damage criteria for excessive TDS concentrations that persistently exceed 3,000 mg/L in springs, UPDES discharges, or receiving streams will be an indication that evaluation for potential material damage is needed.

(Exhibit D23 at 40). Thus, the "threshold parameter" is used to indicate that evaluation for potential material damage is needed.

The CHIA establishes a similar level for ground water quality, using similar language (Exhibit D23 at 41). With regard to the concern established by the PHC of

diminished flow, the CHIA states "a 20% decrease in flows, determined on a seasonal basis, *will indicate that decreased flows are probably persisting and that an evaluation for material damage is needed.*" (Exhibit D23 at 40, emphasis added).

By setting the threshold standards to assess changes in the natural TDS levels and water flows, the Division complied with Utah Code Ann. § 40-10-11(2)(c) (Supp. 2009) and Utah Admin. Code R645-301-729.100 (2009) and made its findings that Alton's application was designed to prevent material damage to the hydrologic balance.

The Division properly complied with relevant laws in approving Alton's application because: A) the CHIA analysis is a design tool that is intended to inform the scope and content of the operator's mining plan and under this understanding material damage criteria are merely thresholds that when met indicate to the Division there is a change in the hydrologic balance requiring further investigation; B) Petitioners' preference for the term "material damage criteria" requires the Division to set criteria for an automatic enforcement action that has been rejected by both OSM and case law; and C) by setting threshold standards to measure changes to the natural TDS and water flow, the Division's CHIA properly determined that Alton's mining plan was designed to prevent material damage to the hydrologic balance.

IV. THE BOARD CORRECTLY CONCLUDED THAT THE MONITORING PLAN ADEQUATELY DESCRIBES HOW MONITORING DATA MAY BE USED.

The Court should affirm the Board's holding that Alton's monitoring plan, both on its own, and when read in conjunction with other parts of the Mining and Reclamation Plan and the regulations, complied with the requirements of the regulations. Petitioners

erroneously claim that the Board erred because the monitoring plan did not comply with the requirement to "describe how these [monitoring] data may be used to determine the impacts of the operation upon the hydrologic balance." Utah Admin. Code R645-301-731.211, .222 (2009).

That claim lacks merit for the following reasons: A) Petitioners have incorrectly described the regulatory requirement; B) Alton's monitoring plan adequately describes how the data may be used; C) when properly read in concert with related documents and the regulations, the monitoring plan describes how the data may be used; D) the Board's findings are supported by substantial evidence and are not arbitrary and capricious; and E) Petitioners' wrongfully assert unappealed errors related to water monitoring on Lower Robinson Creek.

A. Petitioners Have Misstated the Requirements of the Regulations.

To comply with the Utah Coal Program, Alton submitted its Hydrologic Monitoring Plan outlining its projected monitoring of ground and surface water at the mine site and surrounding area.[17] The relevant rules read as follows:

> The permit application will include a ground-water monitoring plan based upon the PHC determination . . . and the analysis of all baseline hydrologic, geologic, and other information in the permit application. The plan will provide for the monitoring of parameters that relate to the suitability of the ground water for current and approved postmining land uses and to the objectives for protection of the hydrologic balance . . . It will identify the quantity and quality parameters to be monitored, sampling frequency and

[17] While the rules speak to ground and surface water separately, the provisions are largely the same and Alton submitted one Hydrologic Monitoring Plan that included the relevant provisions for both ground and surface monitoring (this issue is not challenged by the Petitioners).

> site locations. *It will describe how these data may be used to determine the impacts of the operation on the hydrologic balance.*

Utah Admin. Code R645-301-731.211 (2009) (emphasis added); *see also Id* R645-301-731.222 (setting forth similar requirement for surface water). As noted by the Petitioners, the Utah Coal rules and the federal SMCRA rules read virtually verbatim. Pet. Brief at 31.

Reading the plain language of this rule, the Board found that the "rules do not indicate the level of detail an applicant must supply to comply with the requirement [to describe how the monitoring data may be used]". (R. 5618). With this understanding, the Board found that "the provisions of the monitoring plan and related documents, both on their own and when read in conjunction with the regulations, address and adequately disclose how the monitoring data may be used". (R. 5617).

Nevertheless, disregarding the deference granted to the Board to interpret the Division's rules, Petitioners incorrectly claim the Board erred in approving Alton's application because the monitoring plan failed to "describe how these data may be used to determine the impacts of the operation upon the hydrologic balance." Pet. Brief at 29 (citing Utah Admin. Code R645-301-731.211 (2009)). To make this assertion Petitioners rely upon non-binding comments on draft federal rules and seek to impose novel requirements on the monitoring plan that are not otherwise required.

Petitioners wrongly assert the monitoring plan must include:

> a 'narrative statement' demonstrating how 'adverse impacts due to mining would be distinguishable from those due to other causes' on the basis of 'comparisons [that] can subsequently be made to show the presence or absence of impacts' and that allow ACD. the Division, and interested

> members of the public to 'judge the effectiveness of remedial and reclamation techniques.

Pet. Brief at 32. Petitioners' statement is not a recitation of any binding rule in the Utah Coal Program, but is an assemblage of quotations cobbled together from comments by OSM on a proposed rule that was never adopted into the final federal rule for water monitoring plans nor included in the comments on the final rule. *See* 47 Fed. Reg. 27,717-18 (June 25, 1982). These statements are not binding and have no authority over the Division or Board's approval of Alton's monitoring plan. *See Bragg*, 248 F.3d at 295; *State v. Mooney*, 98 P.3d at 427.

Comparing the plain language of the monitoring plan rule, stated above, with Petitioners' statement demonstrates the length to which Petitioners' argument is stretched. Under the Utah rule there is no explicit requirement that the description be suitable for public use, no requirement to describe how to the data *will* be used to judge the effectiveness of "remedial and reclamation measures," and no language regarding "ways to distinguish mining and non-mining impacts." Rather the requirement is merely to "describe how these data *may* be used to determine the impacts of the operation upon the hydrologic balance." Utah Admin. Code R645-301-731.211, .222 (2009) (emphasis added). Under this plain reading, the Board correctly held the monitoring rule required no specific level of detail, and that the monitoring plan, both on its own, and when read in conjunction with the relevant parts of the Mining and Reclamation Plan and regulations, satisfied the "how the data may be used" portion of the rule.

B. The Coal Hollow Monitoring Plan Adequately Describes How the Collected Data May Be Used.

The rule at issue includes no provisions regarding how detailed Alton's monitoring plan needs to be. Notwithstanding, the Board reviewed Alton's plan and found the plan appropriately fulfilled the intent of the rule. The monitoring plan describes how the collected monitoring data may be used to determine the impacts of the operation on the hydrologic balance. The monitoring plan details the location of hydrologic monitoring points for surface water and groundwater in and around the permit area and identifies the parameters that will be measured from the monitoring points (Exhibit D1 Vol. 7 at 7-57 to 7-59, *see also* Exhibit D1 at Drawing 7-10). The plan states that monitoring data will be collected quarterly from springs in the region (Exhibit D1 Vol. 7 at 7-57). And the plan indicates that the data will be studied to determine whether sampling frequency should be modified (*Id.* at 7-59).

Using these collection sources and methods the monitoring plan states that the data will be collected to show "impacts that could potentially occur as a result of mining and reclamation activities in the proposed Coal Hollow Mine permit and adjacent area." (Exhibit D1Vol. 7 at 7-57). This statement demonstrates that the data will be examined and then analyzed to determine whether impacts are occurring as a result of the mining and reclamation activities. This statement alone complies with the requirement to "describe how these data may be used to determine the impacts of the operation upon the hydrologic balance." *see* Utah Admin. Code R645-301-731.211, .222 (2009).

The monitoring plan also refers to a Division Publication, "Water Monitoring Programs for Coal Mines," which states "[w]hen the analysis of any ground-water sample indicates noncompliance with the permit conditions, then the operator will promptly notify the Division and immediately take the actions provided for in R645-300-145 [Remedial Steps] and R645-301-731 [Operation Plan]." (Exhibit D30 at 6). The publication reiterates the same requirement for surface water samples (*See id.* at 7). By explicitly citing to this publication in the monitoring plan, the content of the publication is incorporated into the monitoring plan by reference, and these statements also demonstrate compliance with the regulation.

The content of the monitoring plan on its own adequately complies with the regulatory requirement. Furthermore, as discussed below, the Board held that compliance was also demonstrated when the monitoring plan is read in conjunction with related documents and the requirements of the regulations. Petitioners fail to squarely address this important element of the Board's analysis on appeal.[18]

C. Reading the Hydrologic Monitoring Plan in Concert with Related Documents and Regulations Demonstrates How the Data May be Used.

The Board agreed with the Division's testimony and correctly found that the monitoring plan is to be read in concert with the matrix of regulatory tools for protecting

[18] Petitioners attempt to gloss over this element by setting forth an incomplete quote of the Board's finding on this question. *See* Pet. Brief at 36 (setting forth partial quote of paragraph 180 of the Final Order which omits the Board's references to other documents within the overall MRP and to the regulations themselves). And though Petitioners subsequently devote a short section of argument to the role of other documents within the MRP, they fail to address how the regulations themselves, when read in conjunction with the monitoring plan, help demonstrate how the monitoring data may be used.

the hydrologic balance found in other applicable regulations. (R.5617). Because the rule is not specific as to the amount of detail required to describe how the data may be used, the Board reasonably considered the context of the monitoring plan within the overall MRP and associated rules to determine the meaning and whether it satisfied the rule (i.e., described how the data may be used to protect the hydrologic balance).

The MRP, and particularly the Operation Plan, the Probable Hydrologic Consequences ("PHC"), and the CHIA, address how the monitoring data may be used.[19] The Operation Plan requires the MRP to outline specific "steps to be taken" by an operator to protect the hydrologic balance during mining and reclamation. Utah Admin. Code R645-301-731 (2009). The monitoring plan requirements are contained within the Operation Plan section of the rules, and are in fact a subsection of the Operation Plan. *Id.* R645-301-730 to -738 (2009). There is no separate rule titled "monitoring plan." Instead the requirement for monitoring plans is merely part of the Operation Plan requirements. It is reasonable to conclude that the requirements of the monitoring plans should be read to work in concert with the regulatory requirements for other parts of the Operation Plan.

At the Board hearing Division hydrologist, James Smith, testified about this symbiotic relationship between the Operation Plan and the monitoring plan. He testified

---

[19] In addition to those sections, the operator is also bound by Performance Standards (R645-301-750), Design Criteria and Plans (R645-301-740 to -748), and Inspection and Enforcement (R645-400). The Performance Standards and Design Criteria and Plans set mandatory obligations to minimize impacts to the hydrologic balance within the permit area and prevent material damage outside of the permit area including requirements that all discharges must comply with Clean Water Act standards, restrictions on sediments control, road drainage, well casings, etc. Utah Admin. Code R645-301-750 (2009). The

about each of the Operation Plan requirements and the Design Criteria and Plan requirements enumerated in Utah Admin. Code R645-301-731 to -748 (2009) and identified the items that addressed prevention and remediation of water quality problems. (R.5882 at 427-40). Smith also explained that the monitoring program works in conjunction with the design and operational requirements "to determine the effectiveness of these other aspects of the plan to see if they're working, to detect whether dissolved or solids – suspended solids are increasing; to identify specific parameters that are of concern to keep track of them, too, so that remedial measured can be taken if necessary" (R.5882 at 433).

On cross-examination, Smith identified provisions in the Operation Plan requiring remedial measures to be taken in the event of groundwater inflows, (R.5882 at 450-51), loss or contamination of water (R.5882 at 451), measures to be taken if water pollution is encountered, (R.5882 at 451-52), in the event of diminution or interruption of water rights, (R.5882 at 452), and in the event of high TDS levels (R.5882 at 459-60). And when asked if the monitoring plans themselves addressed how the data will be used Smith stated: "Well there is language throughout. It says the data will be obtained and submitted to the division and will be examined for impacts". (R. 5882 at 464). In sum, Smith's testimony explains that the monitoring data and the rest of the Operation Plan work together. (R.5882 at 433). Having failed to contravene that testimony below, Petitioners cannot be heard to complain on appeal.

---

regulations also include enforcement provisions that govern actions to be taken based on the hydrologic monitoring data collected.

Like the Operation Plan, the Probable Hydrologic Consequences ("PHC") and the CHIA are also designed to work in concert with the monitoring plan and describe how the data may be used to determine impacts of the mining operations. Specifically, the monitoring plan requirement rule states that the monitoring plan will be "based upon the PHC determination required under R645-301-728 and the analysis of all baseline hydrologic, geologic and other information in the permit application." Utah Admin. Code R645-301-731.211 (2009).

At the Board hearing, Division hydrologist April Abate explained again how the CHIA is intended to address the potential impacts to the hydrologic system identified in the operator's PHC. (R.5883 at 537-38, 576-77). She then testified that the monitoring locations established in the monitoring plan were selected at the points of potential impact to the hydrologic systems identified in the PHC and CHIA. (R.5883 at 540-42, 579). Similarly, the specific threshold levels established in the CHIA are used in conjunction with and compared to the data obtained pursuant to the monitoring plan. (R. 5883 at 553, Exhibit D23). This comparison is used to judge potential causes of material damage to the hydrologic balance outside of the permit area. (R.5883 at 566-67).

The comprehensive monitoring scheme contemplates that the Operation Plan, PHC, CHIA, and monitoring plan be used with one another, and that these documents taken together explain how the data collected under the monitoring plan may be used.

The monitoring regulations themselves also address how the monitoring data may be used and incorporates the provisions of the MRP and the regulations. The subsection of the Operation Plan regulations that immediately follows the requirement for

monitoring plans explains what elements are to be monitored and how often and then provides: "When the analysis of any surface water sample indicates noncompliance with the permit conditions, the operator will promptly notify the Division and immediately take actions provided for in R645-300-145 and R645-301-731 [the Operation Plan]." Utah Admin. Code R645-301-731.223 (2009); *see also Id.* R645-301-731.212 (setting forth parallel requirements for groundwater).

Thus, the monitoring rules explicitly incorporate the other parts of the MRP that are required by the Operation Plan regulations and mandate that they be used when there is a condition of noncompliance. R645-300-145 referenced in this language requires that if monitoring indicates a condition of non-compliance, the operator is required to take "all possible steps to minimize any adverse impact to the environment or public health and safety . . . including, but not limited to: [a]ny accelerated or additional monitoring [such as water monitoring] necessary to determine the nature and extent of noncompliance . . . [and] [i]mmediate implementation of measures necessary to comply . . . ." Utah Admin. Code R645-300-145 (2009). Thus, the monitoring provisions in the Operation Plan, in addition to describing how the data may be used, incorporate by reference the rest of the MRP and the regulations and establish mandatory responses to be taken by the operator if data indicates noncompliance.

Determining the correct action to be taken based on hydrologic monitoring data requires professional judgment and technical expertise by persons with knowledge of hydrology and mining engineering. Here, Petitioners argue that the monitoring plan must explain "how" the data will be used in such as way that the public can use the plan for

oversight. But they offer no language in the rule to support this claim and no reason for concluding that the public would be any better informed if a description were found only in the monitoring plan as opposed to being contained within the greater MRP. To the extent the public may use information in the monitoring plan, the public should be equally if not better able to understand a description of how the data may be used by reviewing referenced documents and related portions of the MRP. In fact, much of the information Petitioners suggest must be in the monitoring plans can only be fully understood by referring to the mine's Design Criteria and Plans and Operation Plan, and may only be properly interpreted and applied by persons with appropriate knowledge and expertise. Requiring that the monitoring plan's description of "how" be contained solely in the monitoring plan would be counter to the integrative scheme of the hydrologic protection regulations and result in duplication that would not be useful to the Division or public.

D. The Boards' Findings are sufficient and Supported by Substantial Evidence.

The Board found that the monitoring plans, "both on their own as well as when read in conjunction with other information contained elsewhere within the overall Mining and Reclamation Plan ("MRP"), adequately describe how the monitoring data gathered may be used to determine the impacts of the mining operations on the hydrologic balance". (R.5617). The Board further held that "the provisions of the monitoring plan, both on their own, and when read in conjunction with regulations, address and adequately disclose how the monitoring data may be used" (R 5619). Finally, the Board found that

the "rules do not indicate the level of detail an applicant must supply to comply with this requirement [the requirement to provide a description of how the monitoring data may be used]". (R. 5618).

These findings were a reasonable interpretation and application of the law based on the facts presented at the hearing. "For this Court to sustain an order, the findings must be sufficiently detailed to demonstrate that the [Board] has properly arrived at the ultimate factual findings and has properly applied the governing rules of law to those findings." *Mountain States Legal Found. v. Pub. Serv. Comm'n*, 636 P.2d 1047, 1052 (Utah 1981). The Board's findings satisfy this requirement. The reasoning is clear and is supported by the evidence. The Board's determination is supported by substantial evidence regarding the contents of the monitoring plan and the explanations as to how the monitoring data may be used. As the finder of fact, and as an expert tribunal, the Board was in the best position to judge the relative competence of expert opinions offered and the Board was in the best position to judge the adequacy of the information provided. As demonstrated at the hearing by Division witnesses. the causes and responses to impacts to the hydrologic balance are complex and multifaceted.

Petitioners have failed to meet their obligation to marshal evidence that supports the Board's findings. They concede that they have not done so and challenge the marshaling requirement as a violation of their due process rights. Pet. Brief at 44. This novel admission and attempt to shift the burden to the Respondents by attacking the findings is not consistent with the precedent of this Court which requires a party challenging findings to first marshal the evidence. *See Martinez,* 2007 UT 42, ¶17.

Petitioners had the burden before the Board and on appeal. Petitioners have put the Board and the Division to the effort to summon the evidence that supports the findings. Petitioners should not be excused from their burden to marshal evidence and ask the court to undertake this obligation on their behalf. Rather their appeal on this issue should be denied for the failure to marshal the evidence and show error.

It was not arbitrary and capricious or an abuse of discretion for the Board to conclude that the monitoring plan was an integral part of the Operation Plan, and the monitoring plan and the other relevant sections of the MRP and could be interpreted in the context of the regulations to satisfy the regulatory requirement.

E. Petitioners' Claims Related to Monitoring on Lower Robinson Creek Should be Rejected Since the Board Found the Monitoring Locations to be Sufficient and Petitioners Have Not Appealed that Issue.

In an effort to preserve their claim, the Petitioners attempt to piggy-back an unappealed issue related to the location of monitoring stations on Lower Robinson Creek onto the issue of whether the permit contains information on how monitoring data may be used to determine the impacts of ACD's mine on the hydrologic balance. The Court should reject that attempt and ignore Petitioners' claim.

Before the Board, Petitioners argued that monitoring points were required to be established immediate adjacent to permit area boundaries. (R.1096-97). Rejecting the Petitioners' argument, the Board found that, "[t]he locations of the monitoring sites were selected based on substantial prior investigations, review of the [baseline] monitoring data, and a comprehensive examination of the hydrologic systems within the permit and adjacent area. They were chosen to demonstrate and determine the effect of mining

operations on the surface and groundwater systems and to monitor those effects so as to prevent material damage to the hydrologic balance outside of the permit area". (R. 5627).

Petitioners wrongly insist on appeal that the Board was required to point to information in the monitoring plan describing,

> how water quantity or quality data gathered from the designated monitoring stations will be adjusted to distinguish the effects of mining from 1) the effects of water that flows into Lower Robinson Creek between each monitoring station and the boundary of ACD's permit or 2) the effect of exposing water discharged from the permit area of ACD's mine to the streambed of Lower Robinson Creek over the distance between the permit boundary and ACD's downstream monitoring station.

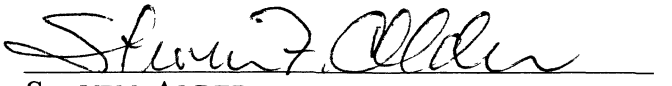
Pet. Brief at 35. Petitioners' argument wrongly presumes (and impermissibly alleges) flaws in the locations of monitoring stations. The Board found that the monitoring station locations were sufficient and Petitioners chose not to appeal the Board's ruling on that issue. Therefore any inference that the monitoring site locations are inadequate, and any argument based on such an inference, should be rejected.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Board of Oil, Gas and Mining finding that the application of Alton Coal Development to conduct surface mining operations satisfies all of the requirements of the Utah Coal Mining and Reclamation Act.

Respectfully submitted this 21st day of September, 2011.

MARK L. SHURTLEFF
Utah Attorney General



STEVEN ALDER
MICHAEL S. JOHNSON
EMILY E. LEWIS
FREDRIC DONALDSON
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on this 21st day of September, 2011, two copies of the foregoing brief were mailed, first class, postage prepaid, to each of the following to:

Stephen H.M. Bloch
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, Utah 84101
telephone 801-486-3161
steve@suwa.org

Jim R. Scarth
KANE COUNTY ATTORNEY
76 North Main Street
Kanab, UT 84741
Telephone 431-644-5278
attorneyasst@Kanab.net

Denise A. Dragoo
James P. Allen
SNELL & WILMER, LLP
15 West South Temple St. #1200
Salt Lake City, UT 84111
Telephone 801-257-1900
ddragroo@swlaw.com
jpallen@swlaw.com